

THE NCAA'S LOST CAUSE AND THE LEGAL EASE OF REDEFINING AMATEURISM

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ABSTRACT

The recent resolution of the Andrew Oliver case may mark the death throes of the NCAA's no-agent rule, prohibiting college athletes from retaining agents in professional contract negotiations, and perhaps the traditional paradigm of amateurism in sport. In light of the trial court's ruling, as well as continuing calls for the revocation of the NCAA's tax-exempt status, the time is ripe for a reexamination of amateurism and the law.

This Note argues that the NCAA has developed a complicated web of largely unenforceable rules and regulations that are unnecessary to maintain tax-exempt status in light of the regulatory environment. This Note examines the antitrust, labor, and tax consequences of changing definitions of amateurism. Focusing on the Internal Revenue Service interpretations of amateurism, this Note concludes that a less restrictive amateurism regime would still achieve many of the legal benefits sought by the NCAA. This analysis has broader implications for tax policy and the culture of sport.

Calling for a shift to a "new amateurism," this Note contributes a novel redefinition of amateurism that reflects the current environment of intercollegiate sport. Modern amateurism should recognize the profit motive of the student-athlete. Under a less restrictive NCAA rule-making regime, the remaining rules are enforceable and fair. In substituting protections for student-athletes in

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place of the current paternalism, the NCAA will reduce the likelihood that future rules will be overturned by court challenges.

INTRODUCTION

Deep into the night of Friday, May 30, 2008, Andrew Oliver fought for his college baseball life. Compliance officials from Oklahoma State and the NCAA interviewed him from about 8:30 p.m. until after midnight and then questioned his father from 12:30 until the small hours of the morning. . . .¹

Projected first-round draft pick Andrew Oliver had become a true ace on the mound for the Oklahoma State Cowboys as a sophomore left-handed pitcher.² Oliver's team had earned a coveted spot in the National Collegiate Athletic Association (NCAA) Tournament's initial field of 64 and on May 30 the team started down the road to the 2008 College World Series in Omaha in the Stillwater Regional.³ But Oliver never got a chance to join his team in postseason play.⁴ Just hours before Oliver was slated to pitch on May 31 against Wichita State, his athletic eligibility was revoked "indefinitely" for a violation of the NCAA's amateurism rules.⁵

Oliver's actions would in any other context be described as prudent: a high school senior, Oliver retained an agent-attorney to assist him in a complex financial arrangement with a sophisticated party, and his attorney was present during contract negotiations.⁶ Those actions, which came to light two years later, clearly violated the NCAA's no-agent rule,⁷ which is found in the organization's bylaws.⁸

1. Aaron Fitt, *Baseball's Agent Quagmire: Oliver Case Dredges up Agent-NCAA Questions*, BASEBALL AM., Sept. 8–21, 2008, at 8.

2. Aaron Fitt, *Headed to Trial: Oliver Case May Have Lasting Ramifications*, BASEBALL AM., Dec. 22, 2008, <http://www.baseballamerica.com/today/college/on-campus/2009/267366.html>.

3. *2008 NCAA Baseball Tournament Schedule/Results*, ESPN.COM, June 26, 2008, <http://sports.espn.go.com/ncaa/news/story?id=3412793>.

4. See Fitt, *supra* note 1, at 8 ("The Cowboys would be without their ace lefthander for the postseason . . .").

5. *Id.*

6. *Oliver v. NCAA (Oliver I)*, No. 2008-CV-0762, slip op. at 2–3 (Ohio Ct. Com. Pl., Feb. 12, 2009).

7. See NCAA MEMBERSHIP SERVS. STAFF, 2008–09 NCAA DIVISION I MANUAL § 12.3 (2008), available at http://ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf (prohibiting collegiate players from contracting with agents and limiting contact between player representatives and professional organizations).

Oliver's punishment was swift and severe; he lost eligibility for post-season play in 2008 and for the entire 2009 season,⁹ compromising his value in the 2009 MLB draft.¹⁰

Typically, a trial court opinion in Erie County, Ohio has little national significance. But the trial judge invalidated the NCAA's no-agent rule—a result predicted by almost no one but Andrew Oliver's attorney.¹¹ Although the case has since settled,¹² this action represents a first blow to the NCAA's rules against professional agents representing college athletes.¹³ The damage done to the no-agent rule is probably irreversible:¹⁴ because the NCAA was unable to

8. *Oliver I*, slip op. at 15.

9. *Id.*, slip op. at 4. A similar 2002 enforcement action against Vanderbilt player Jeremy Sowers led to a six-game suspension, and the no-agent rule has otherwise been only sparsely enforced. Fitt, *supra* note 1, at 8. Oliver returned to play following a court order and was the ninth pick in the second round, and the fifty-eighth overall pick, when selected by the Detroit Tigers in the 2009 Major League Baseball draft. Press Release, Okla. State Univ., Oliver Selected on First Day of Major League Baseball Draft (June 9, 2009), available at <http://www.okstate.com/sports/m-basebl/spec-rel/060909aaa.html>.

10. See *Oliver I*, slip op. at 26 ("If an injunction is not granted the Plaintiff would suffer loss of his college baseball experience, impairment or loss of future baseball professional career, loss in being available for the upcoming draft because he is less likely to be seen, and ongoing damage to Plaintiff's reputation and baseball career."). Oliver signed with the Detroit Tigers for a reported \$1.495 million bonus as a second-round draft pick and the fifty-eighth pick overall. Steve Kornacki, *Tigers Sign Top Picks Jacob Turner, Andrew Oliver*, MLIVE.COM, Aug. 18, 2009, http://www.mlive.com/tigers/index.ssf/2009/08/tigers_sign_top_draft_picks_ja.html.

11. See Fitt, *supra* note 1, at 9 (suggesting that a challenge to the no-agent rule would fail and that, at most, modest changes may be achieved through indirect pressure).

12. Aaron Fitt, *Oliver Settlement Restores 'No Agent' Rule*, BASEBALL AM., Oct. 8, 2009, <http://www.baseballamerica.com/blog/college/?p=2568> (reporting the NCAA's \$750,000 settlement with Andrew Oliver). However, the case was unlikely to be overturned on appeal in Ohio if the parties had not reached a settlement agreement. See *Oliver I*, slip op. at 8 ("An application for an injunction is addressed to the sound discretion of this Court, and unless there is a plain abuse of discretion on the part of this Court in granting or for that matter in refusing injunctions, reviewing courts will not disturb such judgments." (citing *Perkins v. Vill. of Quaker City*, 133 N.E.2d 595 (Ohio 1956))). The NCAA has, as expected, filed a challenge to the ruling, but this initial appeal was denied as premature, and only the damages portion of the trial remained. *Oliver v. NCAA (Oliver II)*, No. 2008-CV-0762, slip op. at 5–8 (Ohio Ct. Com. Pl., Apr. 1, 2009).

13. *Oliver I*, slip op. at 18–21.

14. See Michael Cross, *Andrew Oliver, the MLB Draft, and the College World Series*, ULTIMATE SPORTS INSIDER, May 25, 2009, <http://www.ultimatesportsinsider.com/2009/05/andrew-oliver-mlb-draft-and-college.html> ("I don't see how the NCAA can put the genie back in the bottle regarding legal representation for [student] athletes."); Fitt, *supra* note 12 ("[I]f the NCAA plans to actually try to enforce the rule . . . the return to the status quo won't last long."). Before the 2009 draft, the NCAA issued a memo to college baseball players that was interpreted as a scare tactic to minimize the impact of the Ohio court's ruling. Liz Mullen, *Agents, Union Question NCAA Memo on Baseball Advisers*, SPORTSBUSINESS J., May 18, 2009, <http://www.sportsbusinessjournal.com/article/62483>. The NCAA later had to explain the memo

successfully defend its enforcement of the rule in court, the Oliver case and its hefty subsequent settlement will encourage student-athletes to challenge enforcement actions that damage their prospects for the professional drafts.

Those wondering whether the NCAA goliath can be brought down by a pebble thrown in Erie County will be disappointed; the reality of the impact is likely far murkier. The likely loss of the no-agent rule considerably undermines the NCAA's traditional defense, namely, the inherent value of amateurism. But the NCAA's anachronistic definition of amateurism was likely far more restrictive than necessary to achieve the organization's primary legal goals: insulation from labor law, antitrust violations, and tax liability.¹⁵ The NCAA likely has the flexibility to bear the loss of this rule and a number of other amateurism battles and still maintain its exempt status.¹⁶

This Note examines the NCAA's amateurism rules in the context of one of their underlying purposes—the insulation of the NCAA and colleges from areas of law that would otherwise apply¹⁷—and concludes that the NCAA could and should adopt more permissive amateurism rules. The new rules would better reflect the reality of intercollegiate athletics and still comply with legal standards for amateurism, particularly those of the Internal Revenue Service (IRS).¹⁸ Part I contextualizes the amateurism discussion, including the

in contempt hearings, Michael Cross, *Andrew Oliver Case Update: NCAA Avoids Contempt of Court*, ULTIMATE SPORTS INSIDER, July 14, 2009, <http://www.ultimatesportsinsider.com/2009/07/andrew-oliver-case-update-ncaa-avoids.html>, but the organization continued to intimidate college baseball players into not hiring agents. See Letter from Stephen T. Webb, Assoc. Dir. of Amateurism Certification, NCAA Eligibility Ctr., to Baseball Prospective Student-Athletes (Aug. 19, 2009) (on file with the *Duke Law Journal*) (“It is our staff’s understanding that you were selected by a Major League Baseball (MLB) club in the June 2009 Rule 4 Draft and have decided not to sign a professional contract. Please provide the following information relating to your contact with MLB clubs and your relationship with your advisor. . . . Please note that NCAA regulations require you to provide complete and accurate information to the NCAA Eligibility Center relating to your amateurism certification request.”).

15. See *infra* Part IV.A.

16. See *infra* Parts III.B–IV.A.

17. Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008) (identifying areas of law “in which the myth of amateurism has served to shield university athletic programs and the NCAA from regulation”).

18. Although the NCAA could conceivably also qualify as a tax-exempt trade organization under IRS rules, it is important that the NCAA qualify under the amateur sports and education exemptions because of its role as an umbrella organization for collegiate athletics organizations.

evolution of the ideal of amateurism in sport. Part II describes the rules that the NCAA has implemented to protect amateurism and their widespread failure and resulting collateral damage. Part III examines the general legal import of amateurism and significantly adds to the tax law analysis, suggesting that the NCAA can deregulate amateurism without triggering tax consequences. Finally, Part IV evaluates how a redefinition of amateurism would impact the NCAA's legal protections and provides a model for a new amateurism. This Note's model would advance trends that would not only preserve the legal status of the NCAA as an amateur sports organization but would also deregulate intercollegiate athletics to the benefit of the athletes.

I. THE IDEAL OF AMATEURISM

The NCAA defines amateurism in both normative and positive terms: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation *should be motivated primarily by education and by the physical, mental and social benefits to be derived*. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."¹⁹

The NCAA's normative definition of amateurism addresses the motivations of players, recalling an earlier history of amateurism. But the current descriptive reality of collegiate amateurism exposes the irony of the NCAA. Characterizing student participation in college-level athletics as an "avocation" is actually a truer statement than the NCAA's drafters likely intended: the word means both "[a]n activity taken up in addition to one's regular work or profession, usually for enjoyment" and "[o]ne's regular work or profession."²⁰ Internally contradictory, the word perfectly captures the NCAA's amateurism dilemma.²¹

Amateurism is assumed to be good. This notion of amateurism is characterized by nostalgia for a time when sport was played for pure love. This misremembered glory serves as the foundation for the

If the NCAA failed to plausibly preserve the distinction, the author contends that colleges would likely form a new umbrella organization that better protects the tax exemption. Thus, a retreat to other exemptions would be largely self-defeating.

19. NCAA MEMBERSHIP SERVS. STAFF, *supra* note 7, § 2.9 (emphasis added).

20. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 124 (4th ed. 2000).

21. *See infra* Part II.

modern sense of loss elicited by today's mottled state of amateur sport. The amateurism mythology originated in early Greece where, as the fiction insists, the original Olympians were unsullied by compensation for sport.²² This history is largely allegoric; there were actually no known bars to compensation in ancient Greece.²³ Greeks often generously rewarded athletes, with prize purses reaching ten years' wages.²⁴ The early disciples of Olympic amateurism in the United States, however, fed the false archetype: "The [Olympic] Games . . . lost their purity and high idealism. . . . [S]port must be for sport's sake."²⁵

Between the emergence of the Greek ideal of sport and its errant recollection in modern times, amateurism surfaced in England in a form remembered with less fondness. Amateurism, as defined in 1866 by an English organization, demanded that amateur athletes had never taught athletics for pay or competed for prizes.²⁶ The amateur ideal evolved in modern England so that gentlemen would never have to lose at sport to commoners.²⁷ American sport thus reinvented Greek heroes to justify an ideal actually bred by Victorian classism. The imprint of this tradition is still visible in modern American athletic governance.

In 1906, the Intercollegiate Athletic Association, an organization that would eventually evolve into the NCAA,²⁸ held its first convention to develop restrictive principles of amateurism.²⁹ There

22. See *Definition of an Amateur Athlete: Nations of the Earth Where Modern Sport Flourishes to Agree on More Drastic Rules to Keep Professionalism Away from Amateurism*, N.Y. TIMES, Oct. 26, 1913, at S4 [hereinafter *Definition of an Amateur Athlete*]; see also *Amateur Athlete Status Is Defined: Must Compete "Only for Love of Sport"—Certain Kinds of Prizes Barred*, N.Y. TIMES, June 9, 1914, at 8 (describing changes to the Olympic model to preserve amateurism).

23. Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 9–12 (1991).

24. *Id.* at 10.

25. *Id.* at 11 (quoting AVERY BRUNDAGE, USOC REPORT OF THE GAMES OF THE XIV OLYMPIAD 23–25 (1948) (second alteration in original)).

26. *Id.* at 12–13.

27. The definition was class-divisive and protectionist: "The Amateur Athletic Club of England was established to give English gentlemen the opportunity to compete against each other without having to involve and compete against professionals." *Id.* at 12.

28. NCAA, *The History of the NCAA*, <http://www.ncaa.org/wps/ncaa?ContentID=1354> (last visited Oct. 24, 2009).

29. Kay Hawes, *Debate on Amateurism Has Evolved over Time: Association Prepares for Another Round of Talks on the Issue at 2000 Convention*, NCAA NEWS, Jan. 3, 2000, <http://www.ncaa.org/wps/ncaa?ContentID=26742>.

was to be no recruiting (termed “proselytizing”) of top preparatory school athletes, and no scholarships were permitted for athletic ability.³⁰ The gentility provisions from early English sport remained.³¹ This maxim of once a professional, always a professional, though now less restrictive, is still pervasive in NCAA regulation of amateurism.³²

The early amateurism battle within the Intercollegiate Athletic Association revolved around baseball.³³ As it grew in popularity during the early twentieth century, baseball spawned opportunities for athletes to profit in major, minor, and summer leagues.³⁴ The summer leagues, which attracted large numbers of intercollegiate baseball players, drew prompt criticism.³⁵ According to some critics, those who participated in the summer leagues lost eligibility merely by associating with professionals, whether or not there was remuneration for play.³⁶ To others, the motivation to participate in the summer leagues was more benign, and the intercollegiate players were analogous to other students who used their talents for pay, such as actors³⁷ or perhaps musicians.

The dialogue between two university officials captured the contrasting viewpoints of the NCAA amateurism debate.³⁸ Amos Alonzo Stagg of the University of Chicago opposed any relaxation of the amateurism rules.³⁹ With Nostradamic insight, Stagg stated his fire-and-brimstone vision of the future of amateurism: “[I]t is my prophecy that in a few years you will find that many of our large cities will be supporting professional football teams composed of ex-college players . . . the passing of [less restrictive amateurism rules] would be

30. *Id.*

31. *Id.*

32. *See infra* Part II.A.

33. *See Trying to Define Amateur Athlete: Intercollegiate Athletic Association Committee Suggests Strict Law*, N.Y. TIMES, Mar. 14, 1909, at 53 (describing a proposed definition of amateurism that would end the practice of college students playing baseball in summer leagues for pay).

34. *See Hawes, supra* note 29 (“One of the first divisive issues in the NCAA involved amateurism. In the 1900s, professional baseball began to grow in popularity. Many college athletes began turning to minor-league baseball as a way to make money during the summer months, setting off a heated debate.”).

35. *Id.*

36. *Id.*

37. *Id.*

38. *See id.* (describing the amateurism debate between Amos Alonzo Stagg and J.P. Welsh).

39. *Id.*

an unceasing catastrophe.”⁴⁰ Professor J.P. Welsh of Pennsylvania State University casts the debate in terms of intrinsic capitalism, arguing that a college student who earns money during the summer “needs to be let alone in the full, free, untrammelled exercise of his American citizenship, which entitles him to life, liberty and the pursuit of happiness, which sometimes means money.”⁴¹

There were passionate and vocal advocates on both sides of the amateurism debate. When the committee on summer baseball reported back to the national organization, however, its report was clear: amateurism directly opposes the playing of athletics for material gain.⁴² The NCAA provisions explicitly prohibited paid summer baseball participation.⁴³ The amateurism debate emerged again after World War I, with returning soldiers attending college and playing football for pay on the weekends.⁴⁴ Again, the student-athletes lost the amateurism battle.⁴⁵ Now when athletes play on summer teams in Cape Cod or in the Carolinas, they do so without pay,⁴⁶ and weekend play during the school year is not permitted. As the preceding history suggests, “the vexed question” of amateurism demonstrates the “difficulty of drawing the line between ‘love’ and ‘money.’”⁴⁷

40. *Id.* While Stagg’s vision has largely come true, few would likely describe its results as “unceasing catastrophe.”

41. *Id.*

42. *Id.*; *Trying to Define Amateur Athlete: Intercollegiate Athletic Association Committee Suggests Strict Law*, *supra* note 33.

43. Hawes, *supra* note 29; *see also id.* (“In 1916, the Association’s members finally agreed to insert a definition of amateurism into the bylaws. The definition that passed was one written by the Athletic Research Society: ‘An amateur athlete is one who participates in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom.’”).

44. *Id.*

45. *Id.* Although the NCAA rules prohibited summer baseball for pay, enforcement continued to be a problem. *See id.* (“Summer baseball continues to give much trouble in the enforcement of the amateur law. . . . It is to be regretted that all the colleges do not unite on a whole-hearted and effective effort to prevent their undergraduates playing, without loss of amateur status, baseball for money or its equivalent.” (quoting Palmer E. Pierce, President, NCAA)).

46. Summer leagues, however, often arrange for other summer employment for the players that provide a source of income and accommodates their playing schedule. *See infra* notes 168–71 and accompanying text.

47. *Definition of an Amateur Athlete*, *supra* note 22.

II. THE REALITY OF AMATEURISM IN INTERCOLLEGIATE SPORT

The NCAA's amateurism idealism has failed to foster its intended reality. The amateurism principle rests on two prongs: the athletes are unpaid and they are not merely professionals in training. Along these lines, the NCAA has attempted to insulate college sports from becoming a supermarket for professional teams.⁴⁸ The first prong of the amateurism principle is supported by compensation rules.⁴⁹ The second prong is theoretically supported by the twin pillars of the no-agent and no-draft rules.⁵⁰ But the no-agent rule, a seldom-enforced⁵¹ but formidable hammer, is crumbling in practice. The protective measures of the NCAA, which faces a now perennial discussion about commercialization,⁵² are under attack.

Section A of this Part describes the NCAA's rules to protect amateurism. Section B recounts the commercialization of intercollegiate athletics and depicts the NCAA's idealistic notion of amateurism as practically unrealistic. For example, some of the

48. See generally NCAA MEMBERSHIP SERVS. STAFF, *supra* note 7, §§ 12.1–.6 (listing the rules related to amateurism).

49. See *id.* § 12.02.3 (“A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.”); *id.* § 12.1.2 (“An individual loses amateur status . . . if the individual: (a) [u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) [a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) [s]igns a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received”); *id.* (listing prohibited forms of pay and exceptions); *id.* § 12.2 (describing permissible and impermissible interactions with professional teams); *id.* §§ 12.4–.5 (limiting the employment of student-athletes and the promotional appearance or use of student-athletes' reputations).

50. See *id.* § 12.2.4 (explaining the draft rules and exceptions); *id.* § 12.3 (barring certain interactions with agents).

51. See generally Fitt, *supra* note 1 (describing widespread disregard for the rule and its rare enforcement). The discussion regarding enforcement of the no-agent rule centers largely on the sport of college baseball. The incentive to break the rule is not as high in other college sports, and thus the rule may have more overall effectiveness in those sports.

52. See, e.g., ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 195 (1999) (“If, as college sports continues to commercialize, the NCAA loses some of its cartel powers and tax benefits, then many predict the 1997 restructuring will be followed by a formal exodus of big-time schools.”); McCormick & McCormick, *supra* note 17, at 496 (“[T]hese college sports are fantastically commercial and decidedly not amateur.”); Gabriel A. Morgan, Note, *No More Playing Favorites: Reconsidering the Conclusive Congressional Presumption that Intercollegiate Athletics Are Substantially Related to Educational Purposes*, 81 S. CAL. L. REV. 149, 181–86 (2007) (explaining the effects of commercialism); Gary Brown, *Brand Calls for Increased Focus on Commercialism*, NCAA NEWS, Jan. 16, 2009, <http://www.ncaa.org/wps/ncaa?ContentID=43969> (summarizing former NCAA President Myles Brand's request for a recentered focus on positive commercialism).

NCAA's amateurism rules are largely flouted with impunity. This discussion lays the foundation for a modified definition of amateurism, described in Part IV, that better reflects the reality of college sports.

A. *Rules Protecting Amateurism*

The theme of amateurism runs deeply throughout the NCAA's rules and bylaws. The organization's constitution lists twin amateurism goals: to develop and ensure compliance with satisfactory standards of amateurism⁵³ and "[t]o cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events."⁵⁴ The "basic purpose" of the organization's "fundamental policy" is to retain a clear line of demarcation between intercollegiate athletics and professional sports.⁵⁵ The NCAA relates this foundational goal to an educational purpose and states that the clear line of demarcation comes from the integration of the athlete into the student body and the placement of athletics within the entire education system.⁵⁶ The principle of amateurism⁵⁷ is thus a bedrock of the modern NCAA.

The NCAA's direct regulation of amateurism falls into the two previously denoted categories: the prevention of remuneration and the creation of a barrier between amateur and professional athletics. Other rules that indirectly maintain amateurism take the form of paternalistic rules that govern the activity engaged in by athletes, coaches, and agents.

1. *No Pay.* The no pay rules prevent the amateur athlete from using his or her athleticism "directly or indirectly" for pay in any form in that sport,⁵⁸ accepting a promise of future pay (even if after college),⁵⁹ and receiving any form of financial assistance from anyone⁶⁰

53. NCAA MEMBERSHIP SERVS. STAFF, *supra* note 7, § 1.2.

54. *Id.*

55. *Id.* §§ 1.2–3.

56. *See id.* ("A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.").

57. *See supra* notes 48–50 and accompanying text.

58. NCAA MEMBERSHIP SERVS. STAFF, *supra* note 7, § 12.1.2(a), (d).

59. *Id.* § 12.1.2(b).

60. *Id.* § 12.1.2, 12.3.1.1, 12.4–5.

with few exceptions.⁶¹ The rules strictly limit the financial aid or benefits that the student may receive including academic aid, gifts after the completion of eligibility, outside aid entirely for educational purposes, research grants, and even basic travel or reimbursement of expenses.⁶² The athlete cannot use his or her name, reputation, or athletic popularity for pecuniary gain.⁶³ Some of the restrictions may simply be to close procedural loopholes likely to be abused, but a number of the more draconian rules evoke the ideal of the selfless unpaid Olympian, who was not even permitted to receive reimbursement for time out of work to compete.⁶⁴

2. *Clear Line of Demarcation.* The NCAA holds the line between professional and intercollegiate athletics largely by refusing to permit student-athletes to express a profit motive.⁶⁵ Many of the ways that student-athletes would manifest their self-interest directly collide with the NCAA's motivational script for student-athletes. For example, the NCAA significantly limits the ability of student-athletes to hold themselves out as potential professional athletes through limitations on draft entry (the no-draft rule).⁶⁶ The organization prohibits the signing of a contract or any commitment of any kind to play professional athletics,⁶⁷ competition on any professional athletics team in that sport (even without pay),⁶⁸ and any agreement with an agent for representation and promotion.⁶⁹

61. See *id.* at 190 tbl.15-1 (identifying some types of financial aid that a student-athlete may receive).

62. *Id.*

63. *Id.* §§ 12.4–5 (limiting athlete employment and the promotional appearance or use of student-athlete reputation).

64. See E.A. Glader, *Restrictions Against “Broken-Time” to Open Olympics*, in *OLYMPISM* 47, 47 (Jeffrey Segrave & Donald Chu eds., 1981) (describing payment for time away from a job when “involved in practice for competition, competition itself, or traveling to or from competition or practice” as “generally interpreted to be prohibited by the eligibility rules for the Olympic Games.”).

65. See NCAA MEMBERSHIP SERVS. STAFF, *supra* note 7, §§ 12.1.2, 12.2.4–5, 12.3–6 (describing rules regarding employment, future employment, agents, draft entry, and bars limiting the use of student-athlete reputation or image for commercial purposes).

66. See *id.* § 12.2.4 (setting forth rules on draft entry).

67. *Id.* § 12.1.2(c).

68. *Id.* §§ 12.1.2(e), 12.2.3.2.

69. *Id.* §§ 12.1.2(g), 12.3.

3. *Protection from Professionalism.* The NCAA engages in a parental monitoring of students' outside pay,⁷⁰ their agreements and interactions with agents,⁷¹ and their interactions with coaches or professional sports organizations.⁷² The goals are manifold, but at least part of the motive in these rules is to preserve the purity of college sport.⁷³ Student play on other amateur teams is limited individually by sport to vacation and out of season play.⁷⁴ The participation on any professional team renders a student ineligible for the sport, even if the student received no pay.⁷⁵ Colleges are prohibited from using financial inducements, except approved financial aid,⁷⁶ in recruiting,⁷⁷ and coach contact with students is checked by a complex web of regulations.⁷⁸ Professional negotiations are limited by a combination of strategies including barring attorney or agent contact with the professional team, prohibiting the presence of the agent during negotiations, and strictly limiting the provision of benefits from agents to student-athletes.⁷⁹ Thus agreements between student-athletes and agents are often left unstated and pushed underground.⁸⁰ Such rules attempt to enforce a sharp division between professionalism and amateurism, and they purportedly protect students from the business of sports. The results, however, are of little benefit to athletes.⁸¹

70. See *id.* § 12.1.2 (explaining in detail payments resulting in loss of amateur status).

71. See *id.* § 12.3 (regulating interactions with sports agents).

72. See *id.* § 12.2 (regulating involvement with professional teams).

73. *Id.* § 1.3.2 (“A basic purpose of this Association is to . . . retain a clear line of demarcation between intercollegiate athletics and professional sports.”). The NCAA has also vigorously argued in court that its rules are necessary to safeguard amateurism. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 117 (1984) (“It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams . . .”); Wendy T. Kirby & T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L.J. 31, 40 (1985) (“The NCAA defended [sanctions against a football team] as necessary to preserve amateurism in intercollegiate athletics. (discussing *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983))).

74. See NCAA MEMBERSHIP SERVS. STAFF, *supra* note 7, § 17 (explaining regulations regarding the playing seasons and when, by sport, student-athletes may participate on other amateur teams).

75. *Id.* §§ 12.1.2(e), 12.2.3.2.

76. *Id.* § 13.2.1.

77. *Id.* § 13.1.

78. See *id.* art. 13 (listing rules for recruiting).

79. *Id.* § 12.3.

80. See *infra* Part II.B.

81. See *infra* Part II.B.

*B. Shamateurism*⁸²

“[A]s few thoughtful observers doubt, [intercollegiate football and men’s basketball at major NCAA institutions] are fantastically commercial and decidedly not amateur.”⁸³ Although those singing the dirge for lost amateurism are premature in their mourning, the realistic observer will note extraordinary amounts of money changing hands, fierce competition among collegiate athletes for professional opportunities, and the wholesale flouting of many rules that are intended to promote and preserve amateurism.

College sports is a \$60 billion industry.⁸⁴ Arguing that intercollegiate athletics “form a thoroughly commercial enterprise,”⁸⁵ observers have documented the economic benefit from March Madness, Bowl Games, promotions, and the commercial use of athletes’ images to the NCAA, conferences, colleges, coaches, and corporations.⁸⁶

The fruits of athletic labor are disbursed through a web of beneficiaries, and the dollar figures are staggering. The NCAA reported revenues of \$558.2 million for the 2005–2006 academic year, approximately \$471 million of which inured from the sale of broadcast rights.⁸⁷ The Atlantic Coast Conference alone generated \$148.9 million in the same period and distributed over \$120 million to its member schools.⁸⁸ In turn with astronomical revenues, athletic department budgets have ballooned: at Division I universities, the growth in athletic budgets has outpaced the growth in overall spending at a rate of over two-to-one.⁸⁹ Finally, individuals employed by college athletic departments have also benefited from the immense popularity of intercollegiate athletics: “[t]he average salary, excluding

82. The term is often used to identify the hypocrisy of the ideal of amateurism when viewed in the broader context of the commercial realities of sport. *See, e.g.*, Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 570 n.301 (2002) (defining shamateurism as “the gap in the former rules that allowed ‘amature’ [*sic*] athletes to get paid under the table”).

83. McCormick & McCormick, *supra* note 17, at 496.

84. *Id.* at 496–97.

85. *Id.* at 505.

86. *Id.* at 509–44.

87. *Id.* at 510.

88. *Id.* at 511–12.

89. *See id.* at 520 (“For example, from 1995 through 2001, athletic budgets at Division I schools increased by twenty-five percent while overall spending at those institutions rose by only ten percent.”).

benefits, incentives, and other perquisites, for [coaches] in the elite basketball conferences—the ACC, Big 12, Big East, Big Ten, Pacific 10, and SEC—is \$1.2 million per year.”⁹⁰ For example, Roy Williams, the basketball coach at the University of North Carolina at Chapel Hill, earns an average of \$2.6 million annually,⁹¹ excluding his lucrative promotional deals with such major corporations as Coca-Cola.⁹²

Given the multi-million dollar salaries of their coaches, it is not unexpected that the players themselves dream of large signing bonuses and lucrative athletic shoe deals. Six hours before the deal deadline, the number one overall pick in the 2007 Major League Baseball draft, Vanderbilt left-handed pitcher David Price, signed a six-year contract with the Tampa Bay Devil Rays for \$8.5 million.⁹³ In 2009, San Diego State University right-handed pitcher⁹⁴ Stephen Strasburg signed with the Nationals for a record \$15.1 million in total guaranteed pay.⁹⁵ For the most talented collegiate athletes, college play can resemble major league tryouts with ever-escalating potential salaries and bonuses.

With so much money on the line, it is no surprise that many NCAA rules are worked around or widely flouted. The NCAA is constantly forced to alter its rules to close loopholes that open; at times, it seems as though the NCAA is “governing out of a covered wagon.”⁹⁶ For example, a recruiting phone call ban led to a barrage of e-mail and text messages requesting that recruits call the coaches of their own initiative.⁹⁷ But not all coaches go to such lengths to violate

90. *Id.* at 530.

91. *Id.*

92. See Keith Jarrett, *Coke Ad Features Carolina's Williams: Commercial Centers on Coach's Childhood Playing Ball in Asheville*, ASHEVILLE CITIZEN-TIMES, Feb. 28, 2007, at A1 (describing a Coca-Cola commercial featuring Roy Williams).

93. Tyler Hissey, *Devil Rays Agree to Terms with David Price*, RAYSDIGEST.COM, Aug. 15, 2007, <http://rays.scout.com/2/668823.html>.

94. Player Bio: Stephen Strasburg, San Diego State Official Athletic Site, http://goaztcs.cstv.com/sports/m-basebl/mtt/strasburg_stephen00.html (last visited Oct. 24, 2009).

95. Jim Callis, *The Strasburg and Ackley Deals*, BASEBALL AM., Aug. 17, 2009, <http://www.baseballamerica.com/blog/draft/?p=1724>.

96. Mark Kreidler, *There Are Always Ways Around a Phone Ban*, ESPN.COM, May 26, 2006, http://sports.espn.go.com/ncb/columns/story?columnist=kreidler_mark&id=2459290.

97. See *id.* (satirizing the resulting flouting of the ban). Ignoring the rules is how the game is played. In holding up a mirror to truth, one satirist wrote:

I think Coach realizes that you have all my numbers, so don't be afraid to use them! As an official representative of Midwest U., I am free and clear to take your

the intent of the rules without actually breaking them. Former Indiana basketball coach Kelvin Sampson was sanctioned for making 577 extra calls to prospects after a phone ban was in place.⁹⁸

Previous scandals include secret booster clubs that raised money for payments to football players and other similar rogue booster tales.⁹⁹ Emerging markets for athletes consistently rely on the flouting of NCAA rules, and those who refuse to participate in the mutual back scratching or winking-and-nodding are lambasted as poor recruiters:

Tony Squire . . . said the state of North Carolina has become “infested with street agents,” adding that “there is no question it has changed. What is happening now, the kids are changing and people are running around now offering kids stuff. Nowadays, if somebody comes in with some money, ‘You come play with us and you don’t have to worry about anything coming from your pocket.’” . . . What’s more, the NCAA rules . . . are routinely flouted.¹⁰⁰

The no-agent rule¹⁰¹ falls under all three rulemaking categories associated with amateurism (preventing pay or benefits to athletes, enforcing the clear line of demarcation between amateurism and professional sports, and protecting the student-athlete from exploitation) and is an example of a restrictive rule that has failed to achieve the NCAA’s desired policy goals. The rule’s decline serves as an example of overly restrictive and ineffective rules that define

calls any time you want to make them. Why, Coach might even be standing nearby when your incoming call lights up my RAZR! And if he’s nearby, he might even be able to hear what you’re saying if we should happen to go on speakerphone! Hint, hint!

Id.

98. Bud Withers, *Kelvin Sampson Takes Heat from All Over*, SEATTLE TIMES, Feb. 21, 2008, at D4.

99. E.g., Fernando Dominguez, *There’s Plenty to Share Blame for Northridge Football Folly*, L.A. TIMES, June 2, 2000, at D15 (providing background information on a series of NCAA compliance problems suffered by California State University, Northridge, including an unauthorized booster club providing benefits to athletes); Douglas S. Looney, *Deep in Hot Water in Stillwater*, SPORTS ILLUSTRATED, July 3, 1978, at 18, available at <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1093819/index.htm> (describing a secret Oklahoma State University athletics booster club).

100. Eric Prisbell & Steve Yanda, *A Whole New Ballgame that Williams Won’t Play*, WASH. POST, Feb. 13, 2009, at E01.

101. The rule has provisions banning any agreements with agents, the presence of an outside advisor during contract negotiations, and any benefits from agents. See *supra* Part II.A.2–3.

amateurism in a way that is too tightly linked to the ideal of amateurism rather than a description of amateurism based in reality.

The flouting of the no-agent rule is perhaps most common in the sport of baseball. In June of each year, the Major League Baseball (MLB) draft occurs for high school prospects, rising and graduating college seniors, underclassmen who meet age eligibility requirements, and junior college players.¹⁰² Baseball compensation contracts can have a few moving parts: a signing bonus, a contingency payment, incentive bonus payments, and a college scholarship plan.¹⁰³ Negotiations with athletes may continue until the mid-August deadline.¹⁰⁴ If a deal is not reached by that point, the player has chosen not to pursue the contract but to return to or enroll in college. Yet the intricate contract negotiations usually begin long before the draft.

A player's draft potential is comprised of a number of factors. Physical talent and long-term major league potential are the primary factors.¹⁰⁵ A player's "makeup," or a composite of character traits that could affect his career, is another factor.¹⁰⁶ The list is not complete, however, without the additional factor of "signability."¹⁰⁷ Signability matters primarily because draft picks are valuable tools for building the best farm system. To maximize its draft picks, a team must know in advance the likelihood that it will reach an acceptable deal with the draft prospect. Players that seem likely to return to or enroll in college, to choose to play for a professional team in another sport, or to request a sum of money that is higher than their value to the team,

102. Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 219 (2005).

103. *Id.* at 220.

104. See John Manuel, *Signing Deadline Didn't End Draft Intrigue*, BASEBALL AM., Aug. 27, 2008, <http://www.baseballamerica.com/today/draft/news/2008/266761.html> (providing an example of end-game draft deadline negotiations).

105. Interview with Aaron Fitt, National Writer, Baseball Am., in Durham, N.C. (Mar. 3, 2009).

106. *Id.*

107. Signability is the likelihood that a player will sign a contract for an amount that a team is willing to pay. *E.g.*, Jim Callis, *Mauer, Prior Rekindle One Versus Two Debate*, BASEBALL AM., Sept. 12, 2003, http://www.baseballamerica.com/today/minors/030912mauerpoy_callis.html; Kevin Gorman, "Signability" a Factor for Pirates, PITTSBURGH TRIB., June 7, 2007; Ken Gurnick, *Signability Is Key for Dodgers' Draft Plan*, MLB.COM, June 6, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20060606&content_id=1492360; Farid Rushdi, *MLB: When Teams Draft Signability, Not Talent*, BLEACHER REP., Jan. 2, 2009, <http://bleacherreport.com/articles/100329-mlb-when-teams-draft-signability-not-talent>.

are often selected lower in the draft than raw talent would project.¹⁰⁸ At the same time, players need to maximize their bargaining power and contract at a rate close to their market value. Without an agent to communicate with the team, the student-athlete is at a disadvantage in the draft selection and contract negotiation processes. College players and their families are, for the most part, unsophisticated parties conducting a one-time transaction across the table from a sophisticated and well-staffed professional sports organization seeking to minimize the signing bonuses and salaries of its prospects. Thus, players who strictly follow the no-agent rule may face the consequences of the unequal bargaining power. To some observers, maintaining this bar against agent or attorney representation produces unconscionable results.¹⁰⁹

“The NCAA is a bully, and they’ve been beating up on these kids and these schools for years, and everybody’s been taking it. I can’t believe people put up with it, I really can’t[.]” said Rick Johnson, who mounted a successful multi-prong attack on the NCAA’s no-agent rule in the Andy Oliver case, winning an injunction as well as a \$750,000 settlement after an initial ruling on the merits.¹¹⁰

The systematic flouting of some rules suggests two things. First, the rules fail to reflect the realities of a changing perception of amateurism. Second, the rules may be too numerous, complicated, or difficult to enforce. The corrosion of the no-agent rule was speeded by its unenforceability, widespread disobedience (at least in the case of baseball, for which the timing of the draft before the conclusion of the season made it essential for players to contract with agents before

108. Matt Blood, *Ability, Not Signability*, BASEBALL AM., June 6, 2008, <http://www.baseballamerica.com/today/draft/news/2008/266305.html>.

109. See Fitt, *supra* note 1, at 8 (“You’re talking about a huge business issue that nobody should expect some amateur player coming out of high school or college to be able to deal with on their own.”).

110. Fitt, *supra* note 12; Aaron Fitt, *Oliver Wins Suit Against NCAA*, BASEBALL AM., Feb. 12, 2009, <http://www.baseballamerica.com/blog/college/?p=746>. Additionally, one major league scouting director noted:

[The NCAA] expects us to call and say, ‘Hey, we had a deal with this kid’s adviser, but he went back into school?’ Come on, we’re not going to do that. Why do we care? . . . You enforce it, or do something once you get ahold of it. It’s not that hard to pick up a paper—you can read about it. The college coaches know these guys are represented. You’d think the NCAA would get more involved if they care, because we’re playing a charade here if we think these players are representing themselves, and it’s just family advisers after they get drafted. That’s kind of a joke.

Fitt, *supra* note 1, at 8; see also *id.* (“It’s hard to tell just how much of an issue this is for the NCAA, which seems to alternate between tough talk and blissful ignorance.”).

their collegiate eligibility expired), harsh consequences for student-athletes even when followed, and intrusion into the attorney-client relationship. From the player's perspective, the risk analysis associated with breaking the no-agent rule involves weighing the possible but unlikely prospect of enforcement against the known negative consequences of following the rule, and the "best" choice may frequently be to break the amateurism rules.

III. AMATEURISM AND THE LAW

It is unclear where amateurism ends and professionalism begins. The legal consequences of reaching that tipping point, however, could be grave for the NCAA and universities that participate in intercollegiate sport. Section A describes the broad legal framework, developed by other authors, that the NCAA and universities must consider. Section B lays the foundation for an analysis under tax law. Tax exemptions are valuable to both colleges and the NCAA, protecting billions in sports revenue from taxation.¹¹¹ Both Sections demonstrate, however, that the NCAA is likely at little risk of losing its legal protections and suggest that a liberalized amateurism is justified.

A. *The Potential Risks of a Liberalized Amateurism: Traditional Considerations*

In its most apocalyptic incantation, the loss of the no-agent rule and the muddled line of demarcation between amateur and professional athletics have the potential to undermine legal protections specific to amateurism. There are three primary areas of the law in which amateurism matters: antitrust, labor, and tax.¹¹²

The perceived susceptibility of the NCAA to antitrust challenges has produced significant litigation and legal scholarship.¹¹³ The

111. See *supra* text accompanying note 85.

112. See McCormick & McCormick, *supra* note 17, at 497 (identifying three areas of law that shield colleges and the NCAA from regulation). Tax considerations are discussed and further developed in Part III.B, *infra*.

113. E.g., Deborah E. Klein & William Buckley Briggs, *Proposition 48 and the Business of Intercollegiate Athletics: Potential Antitrust Ramifications Under the Sherman Act*, 67 DENV. U. L. REV. 301 (1990); Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007); Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: "Amateurism" in Big-Time College Sports*, 14 SPG ANTITRUST 51 (2000); Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2003);

resulting rulings, however, tend toward a strong deference to the NCAA for both commercial and noncommercial restrictions as well as nearly universal acceptance of the NCAA's amateurism defense.¹¹⁴ In *NCAA v. Board of Regents*,¹¹⁵ the Court recognized that the product of intercollegiate athletics inherently requires some restraint: "[T]his case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."¹¹⁶ The NCAA generally offers an amateurism defense, arguing that the procompetitive value of amateurism, furthered by the restraints, outweighs any anticompetitive effect.¹¹⁷ The no-draft and no-agent rules are generally upheld as "[p]rotection[s] of amateurism" that are resistant to antitrust challenges.¹¹⁸ Because the rules apply "short-circuited" scrutiny,¹¹⁹ the courts thus exhibit a broad deference to the NCAA on matters of amateurism.¹²⁰ The strong educational mission of the NCAA specifically and intercollegiate athletics generally help the organization to survive challenges.¹²¹ Thus, even a highly deregulated version of amateurism would likely still constitute a valid defense for rules challenged under antitrust law.

The NCAA is largely immune from workers' compensation claims, claims from athletes under employment law, and unionization

Benjamin A. Menzel, Comment, *Heading Down the Wrong Road?: Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L. REV. 857 (2002); Kristin R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003).

114. McCormick & McCormick, *supra* note 17, at 500–01. See generally Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L.J. 331 (2005) (laying out the federal court trend of preferential treatment of the NCAA in major decisions).

115. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

116. *Id.* at 100–01.

117. Muenzen, *supra* note 113, at 264.

118. *Id.* at 269.

119. *Id.*

120. Rascher & Schwarz, *supra* note 113, at 53 ("[I]n later cases . . . the courts have used *NCAA v. Board of Regents* as a starting point, reading Supreme Court dicta as evidence that amateurism itself has passed the reasonableness test, moving forward to evaluate specific follow-on rules designed to support amateurism. These cases analyze whether the NCAA's rules are reasonable and necessary for preserving amateurism, not if amateurism itself is reasonable and necessary." (footnote omitted)); Muenzen, *supra* note 113, at 268–75.

121. See Rascher & Schwarz, *supra* note 113, at 53 (noting that the Supreme Court indicated "academic affiliation is what differentiates NCAA football from NFL football, and thus creates a market").

efforts by college athletes.¹²² The reasoning supporting these broad immunities is largely grounded in the NCAA's emphasis on education and amateurism. After a few early cases protecting student-athletes as employees,¹²³ the ground shifted and the notion was cleanly rejected. The authoritative line of workers' compensation cases have routinely failed to extend statutes to student-athletes due at least in part to their amateur status.¹²⁴ Likewise, the NLRB is reluctant to extend statutory protection to students who are also employees in other contexts.¹²⁵

On the labor front, Professors McCormick and McCormick have argued that the NCAA's self-coined and much advertised term "student-athlete" allows the NCAA to perpetuate the amateurism myth and "obtain the astonishing pecuniary gain and related benefits of the athletes' talents, time, and energy—that is, their labor—while severely curtailing the costs associated with such labor."¹²⁶ These professors cast the NCAA in the role of the "company store" that forces many of its workers to live below the poverty line.¹²⁷

Focusing on the distinct tests to determine the commercial nature of an employee relationship under common law, professors McCormick and McCormick find that certain college athletes are de facto "employees."¹²⁸ The common law test examines the degree of control the alleged employer maintained over the working life of the alleged employee, and occasionally the "economic realities" of the relationship are considered.¹²⁹ McCormick and McCormick argue that the daily lives of student-athletes demonstrate the control that the university has over them.¹³⁰ The student-athlete's grant-in-aid functions as compensation, and student-athletes are economic

122. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 80–81 (2006).

123. See *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 172 (Ct. App. 1963) (finding the student-athlete to be an employee of his university); *Univ. of Denver v. Nemeth*, 257 P.2d 423, 430 (Colo. 1953) (holding that a student-athlete's participation on a college football team is within the scope of employment as an employee of the university).

124. McCormick & McCormick, *supra* note 17, at 498 n.16.

125. See *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004) (holding that teaching and research assistants are not employees of their respective universities when they are primarily students).

126. McCormick & McCormick, *supra* note 122, at 74.

127. *Id.* at 78–79.

128. *Id.* at 79.

129. *Id.* at 90–92.

130. For an account documenting the degree of control that coaches exercise over the lives of student-athletes in big-time sports, see *id.*, *supra* note 122, at 98–118.

dependents.¹³¹ Assuming that this argument stands a reasonable chance of success,¹³² the NCAA may fear the impending applicability of labor law.

Although student-athletes seem to fit within the common law definition of employee, the NLRB's *Brown University*¹³³ decision indicates that the educational context changes the overall analysis. The test articulated by the NLRB in the *Brown University* case requires something other than the traditional "right of control" threshold of student-employees.¹³⁴ Looking at the overall character of the employer-employee relationship, the board uses a four-factor test to categorize the relationship as either primarily educational or primarily economic.¹³⁵ Under the first factor, the alleged employee's status as a student weighs against recognizing the relationship as one of an employer-employee.¹³⁶ The second factor examines the role of the activity within education.¹³⁷ The third factor evaluates the relationship with faculty.¹³⁸ The fourth and final factor of the test considers whether the student has received financial support from the institution, which may weigh in favor of a primarily educational, rather than commercial, relationship.¹³⁹

If the context of the employer-employee relationship is primarily educational, labor protections are unlikely to apply.¹⁴⁰ Professors McCormick and McCormick suggest that some college athletes qualify as employees even under the more restrictive *Brown* four-

131. *Id.* at 117.

132. The applicability of this test is further discussed in Part IV.A, *infra*.

133. *Brown Univ.*, 342 N.L.R.B. 483 (2004).

134. *See id.* at 492 ("Moreover, even if graduate student assistants are statutory employees, a proposition with which we disagree, it simply does not effectuate the national labor policy to accord them collective bargaining rights, because they are primarily students."); *id.* at 490 n.27 (explaining that graduate student assistants are not subject to control by a university in return for payment, but rather that their employment is focused primarily on furthering their own learning experience).

135. *Id.* at 489, 492; *see also* McCormick & McCormick, *supra* note 122, at 120 (describing the four-factor test to determine a student's employee status).

136. *Brown Univ.*, 342 N.L.R.B. at 489, 492.

137. *Id.*

138. *Id.* at 489.

139. *Id.* at 489, 492.

140. *See id.* at 489–90, 492 (describing and applying the four-factor test used to determine that labor protections did not apply because "the overall relationship between the graduate student assistants and Brown [University] is primarily an educational one, rather than an economic one").

factor statutory test.¹⁴¹ Yet even if the relationship between athletes and their institutions is conclusively shown to be of a commercial nature,¹⁴² the threshold that the relationship is *primarily* commercial rather than educational is much more difficult to meet. Given this problem of characterization, the McCormicks' argument seems unlikely to find success in the current legal climate. Thus, it is unlikely that the balance against the potential unionization of college athletes and the potential application of labor laws to the NCAA and colleges will be altered.¹⁴³

B. Working the Officials: Analysis of Amateurism and the IRS

Given the existing scholarship on antitrust and labor law, this Note largely focuses on the potential tax law consequences for the NCAA of an evolving definition of amateurism. The boundaries of tax law exemptions, perhaps the most important legal exemption for the NCAA, are described in this Section. Generally, there are two major taxes from which the NCAA and its member schools are exempt. First, the NCAA and its member schools are exempt from income taxes, which are widely applicable to commercial enterprises, including professional sports organizations.¹⁴⁴ The second tax exemption applicable to the NCAA and its member schools is the Unrelated Business Income Tax (UBIT), which taxes otherwise exempt organizations on income from a regularly operated trade or business.¹⁴⁵

The NCAA is exempt from income taxes as an Internal Revenue Code § 501(c)(3) organization.¹⁴⁶ An amateur sports organization can

141. McCormick & McCormick, *supra* note 122, at 120–55.

142. See McCormick & McCormick, *supra* note 17, at 505–44 (arguing that intercollegiate athletics are essentially commercial).

143. Cf. Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 750–52 (2008) (recommending that the National Labor Review Board not allow unionization of college athletes in favor of congressional policy determination).

144. Josh Centor, *House Committee Member Questions Tax-Exempt Status for College Sports*, NCAA NEWS, Oct. 23, 2006, <http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/ncaa+news/ncaa+news+online/2006/associationwide/house+committee+member+questions+tax+exempt+status+for+college+sports++10-23-06+ncaa+news> (“As a practical matter, educational organizations like the NCAA and its member schools are entitled to income tax exemption as charitable organizations, just like hospitals or churches.”).

145. I.R.C. §§ 501(b), 511–14 (2006).

146. Letter from Myles Brand, President, NCAA, to William Thomas, Chairman, H. Comm. on Ways and Means 1 (Nov. 13, 2006), <http://www.ncaa.org/wps/ncaa?ContentID=44636> (follow “The NCAA’s Response to Chairman Thomas’ Letter” hyperlink).

qualify as an exempt organization on four possible grounds: that the organization serves an educational purpose; that the organization is charitable in nature; that “[t]he organization is organized and operated to foster national or international amateur sports competition, but does not provide athletic facilities or equipment;” or that the organization is a “qualified amateur sports organization” under I.R.C. § 501(j).¹⁴⁷ The NCAA likely qualifies as both an educational organization¹⁴⁸ and as an amateur athletics organization,¹⁴⁹ but its argument for tax-exempt status is factually strongest under the amateur athletics organization provision.¹⁵⁰ The 501(j) exemption allows the amateur athletics organization to be a 501(c)(3) exempt organization and applies to “any organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or to support and develop amateur athletes for national or international competition in sports.”¹⁵¹ The classification excludes local recreational leagues and such professional leagues as the NFL, NHL, MLB, and NBA.¹⁵²

For charitable organizations, an unrelated business is subject to a separate tax when it is (1) a trade or business, (2) regularly carried on, and (3) not substantially related to further the exempt purposes of the organization.¹⁵³ Under the third factor of the unrelated business test, the term “substantially related” has been debated in the context of

147. I.R.C. § 501(j); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 4.76.12.3 (2003).

148. Although the prudence of the presumption has been disputed, there is a congressional presumption that athletics are substantially related to an educational mission. Morgan, *supra* note 52, at 160–62. For a discussion of the NCAA’s education argument, see Letter from Myles Brand to William Thomas, *supra* note 146, at app. A.

149. Letter from Myles Brand to William Thomas, *supra* note 146, app. A at 14–18.

150. Such a statement assumes the, perhaps unlikely, possibility that the congressional presumption may shift.

151. I.R.C. § 501(j).

152. See INTERNAL REVENUE SERV., *supra* note 147, §§ 4.76.12.3.1–4 (describing the examination process for determining whether an organization is an exempt amateur sports organization); *Id.* § 7.25.26.4 (describing legislative intent to keep recreational leagues non-exempt). Although the NFL is exempt under other provisions, Duff Wilson, *NFL Executives Hope to Keep Salaries Secret*, N.Y. TIMES, Aug. 12, 2008, such an arrangement would be insufficient for the NCAA to achieve its broader purpose of protecting its member schools. See *supra* note 18.

153. I.R.C. § 513(a) (2006).

the NCAA's commercialization;¹⁵⁴ despite the colloquy, momentum has not shifted in favor of taxing NCAA income. The consequences of such a shift, however, could have far-reaching impacts for both the NCAA and its member universities.¹⁵⁵ It is thus important for the NCAA to work within the boundaries of tax law exemptions in defining amateurism.

The NCAA clings tightly to the clear line of demarcation, but much of the organization's rules, exhibiting a death grip on the old amateurism paradigm, are likely unnecessary for tax purposes. Over the years, the IRS has developed a line of commentary that yields a very deferential standard of amateurism in sport. The IRS's amateurism opinions are available in cases and revenue rulings as well as nonbinding agency letter rulings or internal manuals; the sum of these parts provides a generally reliable vision of the IRS's amateurism. The following analysis adds to the current research in the area and proceeds along five paths: skill, athlete pay and benefits, classification, commercialization and public benefit, and legal interpretations of amateurism.

1. *Skill.* The colloquial definition of amateurism often divides professionals and amateurs on the basis of skill; an amateur may be a dabbler, a person who has not gained the level of proficiency expected of a professional or is lacking in experience or mastery of fundamentals.¹⁵⁶ Perhaps recognizing that in the Olympics and other international competitions amateur status is rarely associated with skill, the IRS does not connect amateurism to a lower skill level.¹⁵⁷ In

154. See, e.g., Letter from Bill Thomas, Chairman, H. Comm. on Ways and Means, to Myles Brand, President, NCAA (Oct. 2, 2006), *reprinted in* Letter from Myles Brand to William Thomas, *supra* note 146, app. C at 6 (exploring how the commercialization of the NCAA men's basketball championship "further[s] the educational purpose of the NCAA and its member institutions"); Letter from Myles Brand to William Thomas, *supra* note 146, at 21–22 (responding that the telecasting of NCAA events does not make "the purpose of intercollegiate athletics anything other than educational in nature for those who participate"); see also Morgan, *supra* note 52, at 154–62 (explaining the UBIT factors, describing congressional presumptions favorable to the NCAA, and discussing IRS opposition to these presumptions).

155. For examples of the commercial proceeds from intercollegiate athletics that benefit the NCAA, conferences, and member institutions, see discussion *supra* Part II.B.

156. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 20, at 55.

157. See *Media Sports League, Inc. v. Comm'r*, 52 T.C.M. (CCH) 1093, 1093 (1986) (distinguishing the non-exempt petitioner from an exempt amateur sports league on the grounds that the petitioner "provides no formal or ongoing instruction to its members, has no skill

fact, the presumption is that amateurs are highly skilled players.¹⁵⁸ In distinguishing social leagues developed for personal recreational benefit from amateur organizations, the level of skill required for amateurs is assumed to be much higher.¹⁵⁹ Recruitment of the best athletes, official skills training, and skill prerequisites for play are viewed as a public good and encouraged for the furtherance of sport.¹⁶⁰ Thus, amateurism need not be viewed as a ladder-step precursor to professionalism, and leagues that contain players of sufficient skill to play professionally are still amateur leagues.

2. *Athlete Pay and Benefits.* Payment matters. The NCAA's efforts to withhold the private benefits of intercollegiate play from student-athletes, however, likely extend beyond the requirements of the IRS. The only two remuneration schemes that seem to be firmly against principles of amateurism are paying athletes a substantial formal salary for their play¹⁶¹ and sharing gate receipts from intercollegiate sports with the players.¹⁶² Other forms of compensation, largely prohibited by NCAA regulations, are likely much less problematic from the government's perspective. Although

requirements for eligibility to play in its leagues and does not require members to participate in any of its activities").

158. *See id.* (distinguishing the amateur sports organization from another organization seeking to further "amateur athletics" but having a "substantial purpose" to "further the social and recreational interests of its members").

159. *See* INTERNAL REVENUE SERV., *supra* note 147, § 7.25.26.4(1) ("Congress did not intend to grant exemption to social clubs or to organizations of casual athletes or organizations whose primary purposes are the recreation of their members." (citing 122 CONG. REC. 25,961 (1976) (statement of Sen. Culver))).

160. *See id.* § 7.25.26.4(3) ("The following factors are indicators that an organization is not primarily social and/or recreational but rather promotes serious competition in the manner contemplated by the two statutes (C) The caliber of the athletes makes them serious contenders for the Olympic or Pan American Games. (D) The athletes must demonstrate a certain level of talent and achievement in order to receive support from the organization. (E) The organization provides intensive, daily training, as distinguished from sponsoring only weekend events open to and attracting a broad range of competitors. (F) The organization devotes itself to improving the performance of a small group of outstanding athletes rather than emphasizing improvement in the health of the general public.").

161. *See id.* § 7.25.26.7 (recognizing, but not addressing, the question of private inurement).

162. *See id.* § 7.25.26.8(1) ("The nonprofit organization distributed approximately 95 percent of the net gate receipts among the players as players' splits or shares pursuant to individual contracts entered into between the corporation and the players. The operation of a semiprofessional baseball club is ordinarily a commercial activity and not exempt from federal income taxation under IRC 501(c)(4). Rev. Rul. 55-516, 1955-2 C.B. 260, distinguished by Rev. Rul. 69-384, 1969-2 C.B. 122.").

they produce taxable income for the student-athlete,¹⁶³ scholarships for the full cost of attendance do not jeopardize amateur status.¹⁶⁴ Likewise, neither nominal monetary awards for participation in intercollegiate games nor the provision of housing expenses evoke IRS suspicion regarding the public benefit of the organization.¹⁶⁵ Small stipends also seem unobjectionable.¹⁶⁶ And even for international athletes, the unreimbursed taxpayer provision of athletes' lodging, transportation, and meals is explicitly tax-deductible.¹⁶⁷

Most surprisingly, the guarantee of jobs for participation in sport, so long as the athletes are paid for their work and not their play on the field, does not seem to trouble the IRS or the courts. In *Hutchinson Baseball Enterprises v. Commissioner of Internal Revenue*,¹⁶⁸ a semiprofessional team told prospective players "that employment will be found for them during the Broncos season, and that the pay will be at least minimum wage."¹⁶⁹ The jobs were typically manual labor, including roofing, insulation, and yardwork.¹⁷⁰ "A few players are employed full time by petitioner. These players are given field maintenance jobs—picking up trash, cleaning restrooms and bleachers, mowing and watering the field, and repairing the field surface."¹⁷¹ Here, it is important to note that the low-paying jobs

163. Scholarships beyond the cost of tuition, fees, and required books and supplies are taxable income. Internal Revenue Serv., Taxable Income for Students, <http://www.irs.gov/individuals/students/article/0,,id=96674,00.html> (last visited Oct. 23, 2009).

164. See Letter from Myles Brand to William Thomas, *supra* note 146, app. A at 11 ("An organization that grants scholarships to students furthers educational purposes." (citing Rev. Rul. 69-257, 1969-1 C.B. 151; Rev. Rul. 66-103, 1966-1 C.B. 134)).

165. See *Mobile Arts & Sports Ass'n v. United States*, 148 F. Supp. 311, 315-16 (S.D. Ala. 1957) (holding that an organization is tax exempt even where each member of a winning team is paid five hundred dollars and each member of the losing team is paid four hundred dollars); *Hutchinson Baseball Enters. v. Comm'r*, 73 T.C. 144, 155 (1979), *aff'd*, 696 F.2d 757 (10th Cir. 1982) (holding that an exempt amateur sports league can provide housing and employment to amateur players).

166. See INTERNAL REVENUE SERV., *supra* note 147, § 7.25.26.7 ("The forms of support may include stipends, payment of living expenses, housing, and scholarships.").

167. I.R.S. Priv. Ltr. Rul. 8121070 (Feb. 26, 1981) ("[T]axpayers in the host families [for international amateur athletes] are entitled to deduct as charitable contributions, the unreimbursed out of pocket expenses paid for the meals, transportation and lodging of visiting competitors . . .").

168. *Hutchinson Baseball Enters. v. Comm'r*, 73 T.C. 144 (1979), *aff'd*, 696 F.2d 757 (10th Cir. 1982).

169. *Id.* at 148.

170. *Id.*

171. *Id.*

corresponded directly with rates for manual labor. Abusing this permissive approach by arranging sweetheart deals that set players up with highly paid consulting positions would likely be met with great skepticism by both the agency and reviewing judges.

3. *Classification.* For purposes of amateurism, it matters little if the organization is called amateur, professional, or semiprofessional.¹⁷² The word “semiprofessional” in either the title of the league or the competition is, of course, not conclusive proof that the organization is not amateur. In short, it does not matter what the organization is called; there is no magic language. It is instead the characteristics of the athletic organization that define amateur status for tax purposes.

4. *Commercialization and the Public Benefit.* Much has been written about the commercialization of intercollegiate athletics and the potential ramifications in antitrust or tax law.¹⁷³ It is true that extraordinary sums of money are traded and entire industries thrive on the existence of intercollegiate athletics. Yet the government does not view such actions as objectionably commercial.

Similarly, IRS agents have refused to overly concern themselves with the commercial enterprise of sport. Instead of fees charged or revenue collected, it is the public benefit that is of the greatest concern to the IRS.¹⁷⁴ Congress finds benefit not only in the competition of sport on the field but also in the broader development of sport.¹⁷⁵ This public policy is closely analogous to the public value of access, awareness, and participation in the arts.

172. *Id.* at 154 (“Tax law does not rely on labels to determine taxability.”). The NCAA, however, defines as professional any organization that “[d]eclares itself to be professional.” NCAA MEMBERSHIP SERVS. STAFF, *supra* note 7, § 12.02.4).

173. *See supra* note 113 and accompanying text.

174. I.R.S. Priv. Ltr. Rul. 200832034 (May 14, 2008) (“[T]he broadcasting of these athletic events promotes the various amateur sports, fosters public interest in the benefits of its nationwide amateur athletic program, and encourages public participation. Therefore, its sale of broadcasting rights and the resulting broadcasting of its athletic events contributes importantly to the accomplishment of its exempt purposes.” (citing Rev. Rul. 80-295, 1980-2 C.B. 194)).

175. Rev. Rul. 80-296, 1980-2 C.B. 196 (“[T]he educational purposes served by exhibiting a game before an audience that is physically present and exhibiting the game on television or radio before a much larger audience are substantially similar. Therefore, the sale of the broadcasting rights and the resultant broadcasting of the game contributes importantly to the accomplishment of the organization’s exempt purposes.”). These rulings, however, are premised on the educational purposes of the organization. STAFF OF J. COMM. ON TAXATION, 109TH CONG., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION

When the tax-exempt goal of the organization is to promote awareness of and participation in amateur sports, the IRS has ruled that the sale of broadcasting rights to those amateur sports events is not taxable.¹⁷⁶ The revenue need not be nominal.¹⁷⁷ The IRS rulings on this issue also indicate the probability that all sports-related business conducted by the NCAA is unlikely to be subject to the UBIT.

5. *Interpreting Amateurism.* The IRS's evaluation of exempt organizations is guided by the Internal Revenue Manual (IRM). The IRM suggests that the IRS views the term "amateur sports organizations," particularly under § 501(j), as analogous to the terms of the Amateur Sports Act.¹⁷⁸ The Act defines amateurs by incorporating the definitions of the national governing body (NGB) associated with the particular sport.¹⁷⁹ The NGBs are thus given substantial deference for defining amateurism under both the Amateur Sports Act and the IRS interpretations.

The NGBs are largely autonomous, nongovernmental organizations that work with the United States Olympic Committee to administer Olympic teams and represent the United States within international sports federations. These organizations are also empowered to "establish national goals and encourage the attainment of those goals"¹⁸⁰ and to "serve as the coordinating body for amateur athletic activity in the United States."¹⁸¹ Of the major American Olympic sports (there is no national governing body for American football), the designated national governing bodies are USA Basketball, USA Baseball, USA Hockey, and USA Soccer.¹⁸²

FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 146-47 (Comm. Print 2005), available at <http://www.jct.gov/x-29-05.pdf>.

176. Rev. Rul. 80-295, 1980-2 C.B. 194.

177. See *id.* (permitting the sale of national broadcast rights by a conference).

178. INTERNAL REVENUE SERV., *supra* note 147, § 7.25.26.7 ("[An organization that pays athletes without compromising their eligibility under the national governing body's rules] fits the definition of an amateur sports organization within the ambit of the Amateur Sports Act of 1978, which establishes the United States Olympic Committee and regulates the United States' participation in the Olympic Games. The Congressional intent underlying both that Act and IRC 501(j) is similar.").

179. 36 U.S.C. § 220501(b)(1) (2006) ("[A]mateur athlete' means an athlete who meets the eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes.").

180. 36 U.S.C. § 220523(a)(2) (2006).

181. *Id.* § 220523(a)(3).

182. See Team USA.org, Team USA, http://teamusa.org/ngb/sports?sport_type=summer (last visited Oct. 23, 2009) (listing the national governing bodies for each summer sport); Team

The Act is clear that the interpretation of amateurism is intended to be broad; NGBs shall “not have eligibility criteria related to amateur status or to participation in the Olympic Games, the Paralympic Games or the Pan-American Games that are more restrictive than those of the appropriate international sports federation.”¹⁸³ The government is furthermore unlikely to find rules placing harsh restrictions on athletes’ autonomy as necessary for maintenance of amateurism: “Athletes must be given the opportunity to decide what is best for their athletic careers . . . The decision should not be dictated by an arbitrary rule which, in its application, restricts, for no real purpose, an Athlete’s opportunity to compete.”¹⁸⁴ Finally, the USOC prohibits NGB rules “requiring an Athlete to reveal the terms of a personal sponsor contract.”¹⁸⁵

For example, the USA Basketball’s amateurism rules are much less restrictive than those of the NCAA. The NGB’s constitution defines an amateur athlete as “an athlete who is eligible under FIBA rules to compete in international Amateur Athletic Competitions conducted under FIBA auspices.”¹⁸⁶ FIBA is the Fédération Internationale de Basketball, an international amateur sports organization. FIBA prohibits the pay of a player or team during the Olympic Games, but it otherwise permits players to enter into written contracts for payment with club teams.¹⁸⁷ Although excessive professional-scale pay for amateur athletes in amateur competitions would likely evoke private inurement concerns, it is clear that stipends, living expenses, housing, and scholarships are all

USA.org, Team USA, http://teamusa.org/ngb/sports?sport_type=winter (last visited Oct. 23, 2009) (winter sports).

183. 36 U.S.C. § 220522(a)(14) (2006).

184. Letter from Jim Scherr, CEO, U.S. Olympic Comm., to Executive Dirs. and Presidents, Nat’l Governing Bodies pt. A(5) (Nov. 8, 2005), <http://teamusa.org/pages/4062> (quoting 1978 Senate Report on the Act).

185. *Id.* pt. C(4)(d).

186. USA BASKETBALL, CONSTITUTION OF USA BASKETBALL § 1.2 (2008), *available at* <http://www.usabasketball.com/inside.php?page=constitution>.

187. FÉDÉRATION INTERNATIONALE DE BASKETBALL, INTERNAL REGULATIONS 2008: REGULATION H RULES GOVERNING PLAYERS, COACHES, SUPPORT OFFICIALS, AND PLAYERS’ AGENTS (2008), *available at* http://www.fiba.com/downloads/training/agents/Eligibility_NationalStatus_International_Transfers_of_Players.pdf (“H.1.6 Players may enter into a written contract with a club. This contract may state that the player will receive payment.; H.1.7 Players who participate in professional leagues must belong to organisations which are members of the member federation; otherwise they will not be able to participate in the official competitions of FIBA; H.1.8 No financial remuneration for the performances of a player or a team is permitted during the Olympic Games.”).

permissible. Agents are permitted, but regulated; they are required to have clear contractual terms and abide by ethical rulings.¹⁸⁸

In the baseball context, the demarcation line for amateurism is similarly muddled. In simplest terms, an amateur is someone who is not being paid for playing “professional” baseball.¹⁸⁹ But the standards for who can compete and play in USA Baseball games varies; “[w]e first introduced professional athletes into our organization in 1999 with the Pan-American games, which was a qualifier for the 2000 Olympic Games, and most recently have used professional athletes in the 2008 Beijing Games.”¹⁹⁰ Minor league players are considered professionals and would be ineligible for some national teams,¹⁹¹ but those national teams are subdivided by specific class or age rather than amateur status.¹⁹² The NGB’s World Baseball Classic team, on the other hand, includes such well-known professionals as Derek Jeter and Kevin Youkilis.¹⁹³

In sum, to understand the IRS definition of amateurism, one should look to the Amateur Sports Act, defining amateurism by reference to the NGBs for each sport. Those NGBs may then defer to the international organizations for guidance. The definitions used by the NGBs and international organizations often provide a greater degree of freedom to the amateur athlete and permit athletes to play for pay in at least some contexts. The IRS permissiveness suggests that the tax code intends amateurism to be defined broadly for bona fide amateur organizations.

188. See FÉDÉRATION INTERNATIONALE DE BASKETBALL, INTERNAL REGULATIONS 2008: RULES GOVERNING PLAYERS, COACHES, SUPPORT OFFICIALS, AND PLAYERS’ AGENTS, at H.5.6.2.1(p), available at http://www.fiba.com/downloads/training/agents/Eligibility_Players_Agents.pdf (stating that the agent’s duty is “to demonstrate integrity and transparency in all of his dealings with the client”); *id.* Annex 1 to Regulation H5 (providing short standard contract between player and agent).

189. The organization does not incorporate a definition of amateurism in its constitution or bylaws, and the question is one that the organization had not previously confronted. If it were confronted with this question, the organization would most likely defer to USOC and the International Baseball Federation (IBAF). Telephone Interview with David Perkins, Chief Operating Officer, USA Baseball (March 4, 2009) (“[What is an amateur] is a question that we’ve never been asked before.”).

190. *Id.*

191. *Id.*

192. See USABaseball.com, http://web.usabaseball.com/index_a.jsp (follow “Teams” hyperlink) (last visited Oct. 24, 2009) (listing collegiate team and teams divided by age).

193. USABaseball.com, 2009 World Baseball Classic Team Rosters, http://web.usabaseball.com/events/events.jsp?ymd=20090507&content_id=36900&vkey=event_usab (last visited Oct. 24, 2009).

IV. PLAYING THE GAME: PROPOSALS FOR REDEFINING AMATEURISM IN INTERCOLLEGIATE ATHLETICS

A. *The Legal Effect of Adopting a "New Amateurism"*

The law has broadly painted the rough boundaries of amateurism; the NCAA, on the other hand, has confined athletes to a narrowly defined zone well within the bounds of law. Although the NCAA's version of amateurism need not perfectly overlap with the Internal Revenue Service's amateurism, the NCAA should use the crumbling of its amateurism rules as an opportunity for liberalizing amateurism and updating the concept.

A modernized definition of amateurism, described further in Part B, would acknowledge the profit motive of college athletes without permitting payment, discard onerous rules that serve no practical purpose, and re-imagine rules to create true protections. A redefined amateurism could be beneficial or neutral in the context of NCAA legal protections. Courts and agencies are likely to continue to defer to the congressional desire for legal insulation of amateur sports and college athletics organizations.¹⁹⁴ Although it may seem counterintuitive, further deregulation of amateurism may actually strengthen the NCAA's antitrust and employment law position without impacting its tax status.

First, the NCAA may be aided in its antitrust defense by further deregulation of amateurism. The regulations maintaining amateurism are anticompetitive measures, and the NCAA's response to this anticompetitive charge is that the measures serve the larger prosocial purpose of amateurism. It seems improbable that the amateurism defense would be significantly weakened by a redefinition of amateurism;¹⁹⁵ the principle of amateurism would still serve as an important distinction between professional sports and college sports, and whatever procompetitive or prosocial goals professedly served by the maintenance of amateurism would still be served under a broadened amateurism regime. Perhaps the most important implication of this Note's amateurism proposal is that it would reduce the NCAA's susceptibility to lawsuits. The limitations preventing

194. See *supra* Part III.A.

195. See Muenzen, *supra* note 113, at 286 (arguing that weakening amateurism may be problematic for the NCAA's antitrust defense but suggesting that "the NCAA would be wise to limit the amount of economic restraints it places on its members").

student-athletes from making business contracts, promoting themselves, or engaging in professional negotiations with adequate counsel trigger antitrust concerns. Enforcement actions supporting those often arbitrary anticompetitive rules are the typical predicate for athlete-initiated antitrust challenges to the NCAA. Thus, a regime that reduces the anticompetitive limitations on college athletes could reduce the overall amount of litigation. Moreover, these changes could bolster the NCAA's argument that it imposes only reasonable restraints on trade and that some restraints are absolutely necessary to protect amateurism in intercollegiate athletics. Put simply, reducing economic restraints would aid the NCAA in its own defense.

The second benefit of this Note's amateurism proposal is that, under a labor law analysis, both the common law and the *Brown* factors would be more likely to favor the NCAA under a less restrictive regime. The common law analysis, in which the most important factor is the degree of control over the working life of the alleged employee, would significantly change with a relaxation of the amateurism rules. The NCAA would be much less likely to fail this test under the rule changes this Note proposes. By permitting athletes to work in largely unrestricted employment, play on other teams during the summer for pay, and openly pursue future employment with professional sports, the NCAA would reduce its control of the working lives of its student-athletes and also reduce the athletes' financial dependence upon the NCAA and its member institutions. In one enforcement action, a student-athlete whose scholarship support ran out was sanctioned for accepting free groceries.¹⁹⁶ This example illustrates the excessive control that the organization has over the financial lives of the athletes and highlights the economic dependency that underlies this relationship. Permitting student-athletes to have greater freedom to pursue compensation and reasonably enhance their economic position would fundamentally change the characterization of the current relationship in a manner that favors labor law protections for the NCAA.

Similarly, relaxed amateurism rules would further solidify the NCAA's ability to satisfy the *Brown* criteria. Athletes would still be required to maintain full-time student status, satisfying the test's first prong, and the sport's role in education would likewise remain static.

196. Parasuraman, *supra* note 143, at 728 (citing Steve Springer, *Edwards Suspended for One Game; UCLA: Linebacker Ordered to Pay Restitution for \$150 Worth of Groceries Left at His Apartment, Allegedly by Agent*, L.A. TIMES, Oct. 13, 1995, at C4).

But under a regime limiting intense control over the students' daily lives, the relationship with faculty and coaches would shift in a way that favors the NCAA in a *Brown* balancing test. This shift would favor the NCAA because it is the relationship, and not the time commitment, that weighs in the balance. The financial support given by the institution to the athlete would also help to anchor the NCAA's ability to satisfy the final prong of the four-factor *Brown* test. The grants-in-aid and scholarship system is, operationally, the exclusive¹⁹⁷ opportunity for some athletes to earn income, driving the relationship between an institution and its athletes closer to an employer-employee relationship. Under the current system, the institution seems to provide payment for exclusive control of the athlete's physical labor. This is particularly true when contrasted with the general student population who may work independently, unfettered by restrictions on their most marketable skills, and may trade on their names and reputations. By giving student-athletes the economic autonomy that most college students enjoy, the NCAA can remove itself from the role of financial dictator and eliminate the appearance of an employer-employee relationship.

Additionally, the IRS provides wide latitude for a redefinition of amateurism within bounds of a favorable tax status. Thus, these antitrust and labor justifications, in addition to the tax analysis provided in Part III, suggest that the NCAA can and should broaden the scope of amateurism and create a less restrictive regime.

B. Redefining Amateur

It is important to recognize that the modern NCAA scheme is a product of liberalization. There is, however, much room for improvement. With respect to NCAA sports that have analogous professional organizations, the amateur should simply be defined as one who does not currently play for a professional team in that sport, does not receive a salary or compensation tied to intercollegiate play in excess of basic living expenses and tuition, and is a full-time student in good standing.

Such a fundamental redefinition through simplification would be beneficial for a number of reasons. First, the NCAA's acknowledgement of student-athletes' profit motive would

197. The time demand of big-time college athletics makes employment during the season difficult. See McCormick & McCormick, *supra* note 122, at 98–108 (documenting some of the time demands on college football and basketball players).

accommodate opportunities for professional growth. Second, rule changes would reduce the quantity of unenforceable and overly restrictive rules that endanger the legitimacy of all of the NCAA's rules because of their arbitrary enforcement. Third, a less restrictive rule-making ethic would permit the NCAA to better fulfill its organizational goals by substituting rules that are actually in the best interests of the student-athlete for the present system of paternalistic authoritarianism. Changes to less restrictive rules would also be beneficial to the NCAA in reducing litigation and bolstering the NCAA's defenses in both the labor and antitrust law contexts.

1. *For Love of the Game: Acknowledging the Profit Motive.* The benevolent athlete is no longer the hallmark of sport. When fourteen-time Olympic gold medalist Michael Phelps was photographed with a marijuana bong, his most serious consequence was not the three-month ban on competitive swimming imposed on him by USA Swimming but the potential impact of the incident on his sponsorships.¹⁹⁸ Prominent American athletes are often wealthy celebrities. Shaquille O'Neal, for example, had the capital to offer his own mortgage bailout plan to Orlando residents.¹⁹⁹ Tiger Woods and Michael Jordan are among the masters of athletic cross-promotion. Being paid for their skill has not negatively impacted the public's view of these athletes' fidelity to the ideal of sport, and some very highly paid athletes are even considered to embody that ideal.²⁰⁰

The profit motive, spurred by the cultural status and wealth of such star celebrity athletes, is a powerful incentive for many college athletes. Athletics is viewed as a way of paying for college, and many athletes incorporate athletics into their future financial planning. More than one in five Division I male athletes hope to play

198. See *Phelps Suspended from Competition, Dropped by Kellogg*, CNN.COM, Feb. 6, 2009, <http://www.cnn.com/2009/US/02/05/kellogg.phelps>.

199. Mark Schlueb, *Thousands Want Help from Shaq*, ORLANDO SENTINEL, June 17, 2008, at B1.

200. There is an argument that when an athlete has arrived at the pinnacle of the sport, they continue to play for pure love of sport alone because fortune and fame no longer serve as substantial motivating factors. Ironically, perhaps an athlete such as Michael Jordan, who reached the highest ranks of professional sports and continued to play, embodies the pure devotion to sport that the NCAA idealizes. Cf. Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOKLYN L. REV. 1459, 1489–90 (2006) (examining evidence that professional athletes play for many reasons other than money including loyalty, camaraderie, family, and winning).

professionally.²⁰¹ Although not every college athlete who dreams of the NBA, NFL, NHL, or MLB is grounded in reality, thousands of student-athletes can and do have the chance to enter the professional ranks every year. This opportunity represents extraordinary economic potential for top prospects, and thus it is a rational decision to pursue professional opportunities to the fullest.

The NCAA's canonical emphasis on "going pro in something other than sports",²⁰² may represent the likely outcome of an intercollegiate athletics career, but the college sports dream is no longer simply a short love story. The dream is to rise to the realm of athletic nobility, where the heroes are richly rewarded for their triumph over the limitations of the human body. The NCAA's myopia regarding the professional aspirations of college athletes in major sports creates a culture of amateurism that inaccurately reflects contemporary intercollegiate athletics.

The NCAA's approved athletic motivations, which focus on physical improvement and the love of sport, are based not in legal prescience but in obsolete romanticism. The law allows a much more flexible and fluid conception of amateurism than the NCAA approves; therefore, the NCAA has a wide breadth within which to redefine amateurism. The law comprehends that athletes are motivated by profound devotion to the ideal of sport, an appreciation of the physical and social benefits of athletic participation, *and* the potential for profit. A "new amateurism"²⁰³ composite that maintains alignment with the law's distinction between amateurism and professionalism can track the continuing cultural evolution of sports.

2. *Reduction of Restrictive Rules.* The NCAA's labyrinthine rules surely result in unintentional violations. More surprising, however, is

201. Stacy A. Teicher, *College Athletes Tackle Their Financial Future: Former Student Athletes Go on the Road to Show Their College Counterparts How to Avoid Making the Same Mistakes They Did*, CHRISTIAN SCI. MONITOR, Oct. 3, 2005, at 13, available at <http://www.csmonitor.com/2005/1003/p13s02-legn.html>. Only about 1 percent of college athletes succeed. *Id.*

202. E.g., Gary Brown, *Wheaton's King to Have Artwork Displayed at NCAA Convention*, NCAA NEWS, Jan. 8, 2009, <http://www.ncaa.com/sports/w-lacros/spec-rel/010809aaa.html> ("We're all familiar with the tagline on the NCAA's promotional ads that say '[t]here are more than 400,000 student-athletes and most of them will go pro in something other than sports . . .'" (quoting the NCAA's Director of brand strategies and events Damon Schoening)).

203. The call for a new amateurism has been sounded, but the vision for that amateurism varies. E.g., W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 273-84 (2006).

the mass nullification by disobedience of some NCAA rules to which schools, coaches, and professional teams turn blind eyes. Because the NCAA relies on its members for enforcement of its amateurism standards, the NCAA should reexamine its rules and limit them to those truly necessary to protect amateurism. A morass of antagonistic rules is not required by law; a redefined amateurism can shed rules related to athlete employment, summer sport participation, agents, promotion, and entry into the draft. Focusing on the most important, enforceable rules and prohibiting pay for participation on the intercollegiate sports teams would achieve the goals of preserving amateurism and halting an athletics department arms race. Importantly, from a legal perspective, such targeted rules will prevent the judiciary from overturning rules or enforcement actions as arbitrary and capricious.

3. *Substitute Protections for Paternalism.* The NCAA justifies a number of its rules as putative protections of athletes from commercial abuse. But in reality, those rules may be widely unenforceable and detrimental to the interests of the athletes. Paternalistic rules restrict athlete autonomy, limit choice, and may not be in the athletes' best economic interests. Rules that have these negative effects on student-athletes but fail to provide significant protections should be abolished, including any formulation of the no-agent rule, NCAA restrictions on draft entry, and rules limiting student-athletes' employment or use of their own names, images, or reputations for compensation.

The no-agent rule prohibits athletes from adequately pursuing promotion and negotiations in their best economic interests. The rule also may interfere with the attorney-client relationship between agent-attorneys and prospects. It may also result in sophisticated parties exerting unfair bargaining power over unsophisticated parties. The NCAA's no-agent cure here is worse than the NCAA's feared agent plague.

Alternative systems suggest that amateurism can be retained while permitting athletes to contract with agents. Professor Richard Karcher has proposed supervision of the athlete-agent relationship.²⁰⁴

204. Karcher, *supra* note 102, at 224–25 (proposing standardized representation agreements); see also Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781 *passim* (2006) (calling for a more effective means of regulating the athlete-agent industry).

Similarly, the international basketball organization requires agents to conform to its standards and provide clear contract terms.²⁰⁵ A requirement that agents have law degrees would help ensure that agents are qualified to review and negotiate complex contracts and would actually protect naïve players.

A deregulated version of draft entry for collegiate athletes would provide more opportunities for student-athletes to maximize their profitability and economic potential. Varying rules against multiple draft entry essentially establish a timeline for strategic professional decisions. Blanket NCAA prohibitions thus poorly account for variations between the draft processes and require athletes to commit to play on a college team for specific periods of time. The interests at risk in deregulation of drafts are largely those of the student-athletes' investors—the colleges. But the restrictions on draft entry limit the probability that an athlete will enter the draft at the height of his amateur career, which may cause the athlete to lose draft value and bargaining power.

If amateurism is defined largely by an absence of the hallmarks of professionalism, then the line between sports leagues may become more permeable. National and international amateur sports organizations recognize that semiprofessional and amateur sports take many forms and exclusive membership on any particular team is not required for an athlete to be an amateur. Likewise, the NCAA should permit collegiate athletes to participate on multiple teams. Permitting at least some compensation from those outside activities is also reasonable.

Regulating student-athletes' alternative employment gives the organization strong control over the daily lives of student-athletes and limits the student-athlete's range of economic choices. But this paternalism ultimately fails to improve the lives of student-athletes. For some athletes, the most marketable skill they possess is their athletic ability; restricting student-athletes' ability to capitalize on this asset reduces their value in an employment market and thus their economic potential. Allowing student-athletes to choose to take on any kind of part-time work, to negotiate more advantageous athletic contracts, and to receive limited compensation from other amateur

205. See FÉDÉRATION INTERNATIONALE DE BASKETBALL, *supra* note 188, H.5.3.3. (requiring agents to be licensed); *id.* H.5.6.2.1(a) (requiring agents to abide by FIBA regulations); *id.* H.5.6.2.1.(p) (requiring agents to demonstrate transparency in their dealings with clients).

teams would provide them with valuable experience and economic independence. The amateurism resulting from this liberalized regime would more closely resemble the athletics world as it is, rather than the world as the NCAA would like it to be.

CONCLUSION

The dense rules that the NCAA has imposed to protect the intercollegiate athletics enterprise from labor, tax, and antitrust consequences are both unnecessary and misguided. The system that has developed gives only the NCAA and colleges a seat at the bargaining table, excluding the voice of the student-athlete. This exclusion is inappropriate given the dramatic impact of the rules on the daily lives and career arcs of the student-athletes.

Perhaps this design flaw is a result of commercialization, collective action problems, and unequal bargaining power. But the NCAA's failure to act in the best interests of student-athletes is more complex, and it may be inextricably linked to society's failure to recognize the hypocrisy of college athletics compared to other skilled endeavors. Student-athletes are expected to yield nearly total control to an educational institution and a third-party organization for their professional and personal decisions, self-employment autonomy, and rights to their images, name, and reputations. But other hyphenated students who serve dual educational roles—such as the student-musician, the student-actor, the student-artist, and the student-dancer—are not expected to make the same sacrifices. The susceptibility of the student to the harms of commercialization is no greater in the case of the student-athlete than in the case of the creative composer or poet. And the slight differences between student-athletes and other uniquely talented students do not justify the NCAA's micromanagement of student-athletes. Some regulations may be necessary, but the extent of the NCAA's incursion into the private life of the student-athlete is not.

The legal background of the amateurism debate suggests that the law has evolved with a changing cultural definition of amateurism, but the NCAA lags behind in recognizing athletes as they are. Despite its complicity in the increased commercialization of sport,²⁰⁶ the NCAA has failed to create adequate accommodations for the professional and financial well-being of student-athletes. Indeed,

206. *E.g.*, Brown, *supra* note 52.

some of the very rules drafted to protect student-athletes disadvantage them at the bargaining table. It is thus time for an amateurism that better serves the modern goals and realities of amateur sport and does not dictate student-athletes' every decision. The amateur athlete need not be wholly self-sacrificing in order to play for love of the game and create value for the public.